IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

WEDNESDAY, THE 28TH MARCH 2007 / 7TH CHAITHRA 1929

Crl.MC.No. 1552 of 2005()

CC.380/2004 of JUDL. MAGISTRATE OF FIRST CLASS-I, KOZHIKODE

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PETITIONER:

P.M.PADMANABHAN, S/O.KRISHNA MENON,
ADVOCATE BY PROFESSION, `SARAL',
ANNIE HALL ROAD, CALICUT-673 002.

BY ADV. SRI.P.RAMAKRISHNAN NAIR
SMT.SANIKA.V.S.

RESPONDENTS:

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1. K.P.SETHUMADHAVAN,
S/O.ANANDHAN NAIR, SREELAKAM,
BEYPORE, CALICUT-673 015.

2. THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.K.S. SIVAKUMAR
ADV. SRI.GRASHIOUS KURIAKOSE

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 12-02-2007 ALONG WITH CRMC NO. 1558 OF 2005 CRMC NO. 1686 OF 2005 THE COURT ON 28-03-2007 PASSED THE FOLLOWING:

V. RAMKUMAR, J.

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Crl.M.C. Nos. 1552 of 2005, 1558/05 & 1686 of 2005

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Dated, this the 28th day of March 2007

ORDER

Accused Nos. 1, 3 and 2 respectively in C.C. 380 of 2004 on the file of J.F.C.M.-I, Kozhikode are the petitioners in these Miscellaneous cases filed under Section 482 Cr.P.C. In these proceedings, the petitioners seek to quash the complaint pending before the J.F.C.M.-I., Kozhikode where the case is pending as C.C. 380 of 2004 after cognizance has been taken for an offence punishable under Section 108 - I of the Companies Act, 1956 (hereinafter referred to as 'the Act' for short) for the alleged contravention of Section 108 of the said Act. The said complaint was was filed by the common first respondent namely K.P. Sethumadhavan a former director of a public limited company by name Al-Ameen Pvt. Limited.

2. The case of the complainant can be summarised as follows:-

The Company is having a paid up capital of Rs. 1,00,000/-. The paid up capital was raised by the Company by way of sale

proceeds of the shares to the shareholders. The complainant has 2.5 percent of the shares in the company. The accused persons who were directors of the company were trying to oust the other directors and the share holders from the Company. They were functioning as a group within the Director Board and were trying to reduce the company to their fold. On account of the might of the three accused persons the Directors and shareholders of the Company are unable to resist the same. As per an important change brought about by the Company Law Amendment Act, 2000, every public limited company was bound to increase its paid up capital up to Rs. 5,00,000/-. Accordingly, the Company received a direction from the Central Government to enhance its shares from Rs. 1,00,000/- to Rs. 5,00,000/-. A time limit of two years was granted for increasing the share capital. The accused persons who are controlling the affairs of the company conspired together with a view to keep the entire shares by way of enhanced share capital among themselves without distributing the same among the shareholders of the Company. As part of the above conspiracy, they did not do anything till the fag end of the

time limit prescribed for distribution of shares towards the enhanced share capital. Immediately before expiry of the said period of two years, the accused persons by colluding each other and by misusing their authority as directors of the company took a decision to acquire bulk shares of the company by forming a group of relatives and friends. Accordingly, without giving any proper opportunity to the existing share holders to subscribe to the new share capital, the accused persons hurriedly took steps to take a special resolution under Sec. 81 (1)(a) of **the Act**. The company thus issued forty thousand new shares each worth Rs. 10/-. Majority of the newly issued shares were acquired by the accused persons acting as a “group” consisting of their friends and relatives. It was acquired with a view to controlling the affairs of the company to the prejudice of the other shareholders of the Company. Forty thousand shares were issued to 14 relatives and friends of the accused persons as stated in the complaint. It can thus be seen that more than 75 percentage of the shares have been acquired by the accused as a group consisting of their friends and relatives. Section 108 A of the Act

expressly prohibits the acquisition of more than 25 percent of shares as a group without the prior approval the Central Government. The acquisition of shares by the accused is for exercising a controlling interest over the company. The accused persons as the Directors of the Company are mismanaging the affairs of the Company in a manner highly prejudicial to the interest of the share holders. No proper notice was served either to the complainant or to the existing share holders of the Company regarding the issue of new shares. The complainant and other share holders came to know the allotment of new shares only on receipt of the annual report of the company. The above mentioned actions on the part of the accused amount to violation of the provisions of Section 108 A of the Act and punishable under Sec.108 I of the said Act. Hence, the complaint.

3. I heard Advocate Sri.P. Ramakrishnan Nair , Senior Advocate Sri.N.N. Sugunapalan and Advocate Sri. Philip Mathew appearing for the respective petitioners and Advocate Sri. Gracious Kuriakose appearing for the common first respondent.

4. Advocate Sri. Grashious Kuriakose, the learned counsel appearing for the first respondent/complainant made the following submissions in support of the sustenance of the complaint:-

Section 108 A of the Companies Act prohibits monopolising of shares of a Company. In order to attract the offence all that the complainant will have to prove is that the Company in question is a Public Limited Company, that no previous approval of the Central Government has been obtained and that more than 25,000/- of the shares as a group have been acquired by the accused . The requirements of Section 108 G of the Companies Act are matters of evidence. Similarly, the nature of business and volume of business etc. are matters of evidence. The audit report now produced by the accused cannot be looked into by the court. A1 to A3 have acquired 13050 shares which is more than 25% of 5000 shares. Since there is no dispute regarding the identity of the accused, their personal appearance before court need not be insisted and exemption from personal appearance can be granted.

5. I am afraid that I cannot agree with the above submissions. Section 108 A of the Companies Act reads as follows:

> ***"108 A. Restriction on acquisition of certain shares -*** *(1) Except with the previous approval of the Central Government no individual, firm, group, constituent of a group, body corporate or bodies corporate under the same management, shall jointly or severally acquire or agree to acquire, whether in his or its own name or in the name of any other person, any equity shares in a public company or a private company which is a subsidiary of a public company, if the total nominal value of the equity shares intended to be so acquired exceeds, or would, together with the total nominal value of any equity shares already held in the company by such individual, firm, group, constituent of a group, body corporate or bodies corporate under the same management, exceed twenty-five per cent, of the paid-up equity share capital of such company.*
>
> *(2) Where any individual, firm, group, constituent of a group, body corporate or bodies corporate under the same management (hereafter in this Act referred to as the acquirer), is prohibited by sub-section (1) from acquiring or agreeing to acquire except with the previous approval of the Central Government, any share of a public company or a private company which is a subsidiary of a public company, no -*
>
> *a) company in which not less than fifty-one per cent, of the share capital is held by the Central Government ; or*
>
> *b) corporation (not being a company established by or under any Central Act; or*

c) financial institution

shall transfer or agree to transfer any share to such acquirer unless such acquirer has obtained the previous approval of the Central Government for the acquisition, or agreement for the acquisition, of such share.

In order to attract Section 108 A of the Act the Company has to be a "dominant undertaking"in view of Section 108 G of the Act. The said Section reads as follows:-

"108 G. Applicability of the provisions of sections 108 A to 108 F - The provisions of sections 108 A to 108 F (both inclusive shall apply to the acquisition or transfer of shares or share capital by or to, an individual firm, group, constituent of a group, body corporate or bodies corporate under the same management, who or which -

a) is, in case of acquisition of shares or share capital, the owner in relation to a dominant undertaking and there would be, as a result of such acquisition, any increase -

(i) in the production, supply, distribution or control of any goods that are produced, supplied, distributed or controlled in India or any substantial part thereof by that dominant undertaking, or

ii) in the provision or control of any services that are rendered in India or any substantial part thereof by that dominant undertaking, or

b) would be as a result of such acquisition or transfer of shares or share capital, the owner of a dominant undertaking; or

c) is, in case of transfer of shares or share capital, the owner in relation to a dominant undertaking.

The expressions "group", "same management", "financial institutions, "dominant undertaking" and "owner" used in Sections 108 A of Section 108 G shall have the same meaning for the same expressions occurring in the Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter referred to as the M.R.T.P. Act) in view of Section 108 H of the Companies Act. "Dominant undertaking" has been defined under Section 2 (d) of the M.r.T.P. Act which reads as follows:

2(d) "dominant undertaking" means-

(iii) an undertaking which, by itself or along with inter-connected undertakings, produces, supplies, distributes or otherwise controls not less than one-fourth of the total goods that are produced, supplied or distributed in India or any substantial part thereof; or

iv) an undertaking which provides or otherwise controls not less than one-fourth of any services that are rendered in India or any substantial part thereof;

Explanation II - where any goods (.....) are the subject of different forms of production, supply, distribution or control, every reference in this Act to such goods shall be construed as reference to any of those forms of production, supply, distribution or control, whether taken separately or together or in such groups as may be prescribed.

Explanation III - The question as to whether any undertaking, either by itself or along with inter-

connected undertakings, produces, supplies, distributes or controls one -fourth of any goods or provides or controls one-fourth of any services may be determined according to any of the following criteria, namely, value, cost, price, quantity or capacity of the goods or services.

Explanation IV - In determining, with reference to the features specified (in sub-clause (iii) or sub-clause 9iv), as the case may be, the question as to whether an undertaking is or is not a dominant undertaking, regard shall be had to --

(i) the average annual production of the goods, or the average annual value of the services provided, by the undertaking during the relevant period; and

(ii) the figures published by such authority as the Central Government may, by notification, specify, with regard to the total production of such goods made, or the total value of such services provided, in India or any substantial part thereof during the relevant period.

Explanation V - In determining the question as to whether an undertaking is or is not a dominant undertaking in relation to any goods supplied, distributed or controlled in India, regard shall be had to the average annual quantity of such goods supplied, distributed or controlled in India by the undertaking during the relevant period.'

Explanation VI- For the purposes of his clause, "relevant period" means the period of three calendar years immediately preceding that calendar year which immediately precedes the calendar year which the question arises as to whether an undertaking is or is not a dominant undertaking.

Explanation VII - Where goods produced in India by an undertaking have been exported to a country

outside India, then the goods so exported shall not be taken into account in computing for the purposes of this clause -

(i) the total goods (...) that are produced in India by that undertaking; or

ii) the total goods (.....) that produced, supplied or distributed in India or any substantial part thereof".

The expression "group" has been defined under Section 2(ef) of the M..R.T.P. Act) as follows:

"ef) *" group" means a group of -*

(i) two or more individuals, associations of individuals, firms, trusts, trustees or bodies corporate (excluding financial institutions), or any combination thereof , which exercises, or is established to be in a position to exercise, control, directly or indirectly, over any body corporate, firm or trust, or

ii) associated persons;

Explanation - For the purposes of this clause -
(I) a group of persons who are able, directly or indirectly, to control the policy of a body corporate, firm or trust, without having a controlling interest in that body corporate, firm or trust, shall also be deemed to be in a position to exercise control over it;

(II) "associated persons"-

(a) in relation to a director of a body corporate, means -

(i) a relative of such director, and includes a firm in which such director or his relative

is a partner;

ii) any trust of which any such director or his relative is a trustee;

iii) any company of which such director, whether independently or together with his relatives, constitutes one-fourth of its Board of directors;

iv) any other body corporate, at any general meeting of which not less than one-fourth of the total number of directors of such other body corporate are appointed or controlled by the director of the first mentioned body corporate or his relative, whether acting singly or jointly;

b) in relation to the partner of a firm, means a relative of such partner and includes any other partner of such firm ; and

c) in relation to the trustee of a trust, means any other trustee of such trust;

III) where any person is an associated person in relation to another, the latter shall also be deemed to be an associated person in relation to the former".

6. The Company Al-Ameen Ltd. was incorporated with the following objects:

"To carry on all sorts of business of printers, stationers, lithographers, type founders, stenotypes, electro types, photographic printers, photo-lithographers, engravers, die sinker, book binders, designers, paper manufacturers, book sellers

> *publishers, advertising agents, dealers in similar or analogous to the foregoing or any of them or connected therewith and also to carry on the business of publishers of newspapers, journals, magazines,books and other literary works and undertakings".*

Thus, the company is a small company which cannot be said to produce supply or distribute or otherwise control not less than 1/4th of the total goods which are produced, supplied or distributed in India or a substantial part thereof so as to constitute a "dominant undertaking". From the Directors report for the year 2002-2003, it can be seen that the Company had incurred a net loss of Rs. 89,000/-. In order to be a company which attracts Sec. 108 A of the Act, it has to be a dominant undertaking within the meaning of the M.R.T.P. Act. As noted earlier, a dominant undertaking is one which produces supplies distributes or otherwise controls not less than 1/4th of the total goods that are produced, supplied or distributed in India or any substantial part thereof. Thus, Al-Ameen Ltd. does not answer the description of *"dominant undertaking".* Unless the company is a "dominant undertaking", Section 108 A has no application. There is not even a whisper in the complaint that the Company in

question is a dominant undertaking.

7. The M.R.T.P. Act itself is a legislation meant to provide that the operation of the economic system does not result in the concentration of economic power to the common detriment and for the control of monopolies and for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith. It can have no application to a company in which the complainant and the accused persons are four out of seven directors. In fact, consequent on the Companies (Amendment Act) 2000, in order to comply with the statutory requirement of having a minimum paid up capital of 5 lakhs rupees., the company in its annual general body meeting for the year 2001-2002 held on 4-9-2002 passed three resolutions of which one was to increase the authorised capital from Rs. 1,00,000/- to Rs. 5,00,000/- by the addition of 40,000/- equity shares each of Rs. 10/-. The annual general body meeting was convened after giving 15 days statutory notice to all share holders including the complaint as provided under Sec. 81(1) of the Act. Accordingly, fresh allotment of shares was made on the

strength of special resolution passed under Sec. 81 (1A) of the Act in the name of 20 share holders. 12 of the allottees were share-holders entitled to proportionate shares under Section 81 of the Act. The accused persons who were directors along with one M. Rasheed and 8 others held 25.5% of the shares. Therefore, they were entitled to acquire 25.5% of the new shares. Hence, they had a right to acquire 25.5% of the shares. Thus, the Company had complied with all the necessary statutory procedures and formalities required under the Act for the passing of the resolution to amend the memorandum of association and the special resolution to amend the articles of association and also for passing the special resolution required under Sec. 81 (1A) of the Act. The group alleged in the complaint also does not answer the definition of the word “group” in the M.R.T.P. Act. The alleged offence is one which can be committed only by a company which falls under the definition of “dominant undertaking” within the meaning of the M.R.T.P. Act. The complaint is conspicuously silent about the above necessary ingredients of the offence. It was without noticing all these

aspects that the learned Magistrate to cognizance the offence. When the essential ingredients to attract the offence punishable under Sec. 108 - I of the Act were not brought out in the complaint, the learned Magistrate could not have taken cognizance of the offence and it would be an abuse of the process of the court to proceed with the complaint which did not make out the ingredients of the offence. It would be a poor solace to the accused be to told that they can seek a discharge at the appropriate stage or an acquittal after trial, when the complaint itself does not disclose the ingredients of the offence justifying the continuance of the proceedings. Hence, the cognizance taken by the learned Magistrate is hereby quashed and C.C.No. 380/04 pending before the J.F.C.M.-I, Kozhikode will also stand quashed.

These Crl. Miscellaneous Cases are allowed as above.

V. RAMKUMAR,
(JUDGE)

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